

# Choosing between cash and periodic payments

Stephen Maguire reviews the relationship between legal and professional advisers in the wake of the *Thompson* cases

**THE RECENT COURT** of Appeal decision in the *Thompson* cases highlights an important facet of the periodical payments regime which was introduced by the Courts Act 2005. The issue before the court was one of statutory interpretation, namely ss 2(8) and ss 2(9) of the Damages Act, with particular reference to the Retail Price Index.

The interpretation of statutes is clearly a matter for the court. It is an evidential question, with labour economists, forensic accountants and financial advisers all providing input. Ultimately, the court decided on the evidence which index was to be preferred. It is another example of the common law evolving and embracing the ever changing financial and fiscal climate.

At the time of writing, the *Thompson* cases were still going through the appellate process, but for the purposes of this article, it is assumed that the law is as per the Court of Appeal decision.

## Electing for periodical payments

However, the question of the relevant index was only part of the equation. On what basis do the parties decide whether to elect for periodical payments or cash, and if so, for which heads of damage? This is largely a decision for the claimant, but as was touched upon in one of the *Thompson* cases, to what extent will the defendant's preference be taken into account? Are these questions legal, or financial?

If a case goes to trial, the option is to a large extent taken out of the hands of the parties. The court will decide which is the better option, and as in the case of *Godbold v Mahmood* [2005] EWHC 1002 (QB), the court can impose periodical payments. The parties are then presented with a *fait accompli* – the decision is taken out of their hands.



But the vast majority of cases still settle out of court. Whilst the court still has a general oversight in cases where both parties are of full capacity, there are no known judicial intervention to interfere with a proposed consent order between the parties, whether this is on a periodical payment or a lump sum basis.

However, this matter becomes more important where there is a claimant under a disability, with the approval of the court required for any consent order. It is in these instances that the lines can become blurred between what is legal advice, and what is financial advice. If it is the latter, are lawyers qualified to give such advice, and more importantly are they authorised to do so?

Before joining the Bar I was a practising solicitor, acting predominantly for claimants, and have conducted many high value cases, instructing both junior and leading counsel where appropriate, and therefore feel qualified to look at the situation from both points of view.

A barrister's role is ultimately transactional, tuning the finer legal points, engaging in the bartering process of settlement conferences, and occasionally

crossing swords with his opposite number in court. He would then move onto his next case. Rarely would he be involved in any way post settlement, and the input is very "back-end loaded", as activity inevitably increases as the court date or settlement meeting looms. In my experience, it is only at this point where periodical payments are raised. The barrister is often looked upon as a fount of all knowledge, and will often be asked about the suitability or otherwise of periodical payments.

Conversely, at this point the solicitor's role tends to be subsumed by that of the barrister. Throughout the case, the solicitor has been the main point of contact and has done an immense amount of good work in order to bring the case to its current position, but tends to defer to the barrister as the case approaches its conclusion.

## A financial consideration

In my view, the decision (or not) to take periodical payments is primarily a financial decision. The whole litigation case will have been built around the opinions of experts – medical, care,

employment. The involvement of a financial adviser is becoming increasingly important, not just because of periodical payments, but also because I believe that the lawyers should look beyond the transactional nature of the litigation.

In tort, the compensation principle has always been based on assumptions. It is not too long ago, that is before *Wells v Wells* [1998] 3 All ER 481, that damages were awarded based upon the assumption that a claimant could expect to obtain a return of between 4 per cent and 5 per cent per annum, with the corresponding multipliers that this entailed. This changed with *Wells v Wells*, where the House of Lords held that the discount rates should be based upon the rate of return obtained from index-linked government securities (ILGS), which at the time yielded around 3 per cent per annum.

However, the Damages Act also provided for the Lord Chancellor (as was) to prescribe a discount rate from time to time, for example when there has been a shift in the economic situation. This power has only been exercised once, in June 2001, when the Lord Chancellor lowered the discount rate to 2.5 per cent, at the same time departing from the principle espoused in *Wells v Wells*, such as the yield on ILGS, in recognition of the fact that the vast majority of claimants, including importantly, patients whose financial affairs were overseen by the Court of Protection, invested largely in equities. Historically these had outperformed fixed-interest type investments by a considerably.

The Lord Chancellor's statement highlights the inherent conflict between the approach in *Wells*, and the realities of investment practice. This is even more important since the Mental Capacity Act came into force in October 2007, particularly for claimants under a disability. Deputies are now required to obtain financial advice from an authorised person, and no longer have the safety net of the panel brokers, which were in effect the default mechanism for Court of Protection clients. Damages are awarded for a purpose. Whilst nobody can stop a claimant of full capacity obtaining his award and putting it all on the 2:30 at Kempton, it is incumbent upon his advisers to at least point him in the right direction.

### Getting the professionals in

Again, with the advent of the Mental Capacity Act, this is likely to give rise to an increase in the number of professional deputies, or at least the number of cases which professional deputies administer. They will be more experienced, and are likely to either have some in-house financial expertise or relationships with appropriate advisers. But this is not always the case, as deputies are often appointed post-settlement, with the Litigation Friend being the one who actually makes the key decisions pre-settlement.

However, with lay deputies in particular, additional input is required. The decision becomes far more financial than legal. The lawyers can argue about the relevant indices, but the fundamental choice between periodical payments or cash is ultimately a financial one, and will depend upon a number of factors, some straightforward, others less so.

Lawyers, both barristers and solicitors are pre-conditioned to think in terms of lump sums when evaluating a case – "I think it is worth £x or £y". The whole process of compiling a schedule of loss is geared towards the production of a final figure. This in turn creates expectations, with a claimant inevitably registering a "ballpark figure", denoting the value of the claim.

Similarly, the question of periodical payments is often left until the end of the litigation process, at a time when the claimant is under most pressure, and when, subconsciously a concept which will by definition significantly reduce the "valuation" of the award in lump sum terms if introduced.

The decision to accept a lump sum or periodical payments will depend upon the facts of each case – one man's meat is another man's poison – and will be influenced by many things. Does the claimant prefer flexibility over security? Does the tax-free nature of the periodical payment increase their overall worth to the claimant? What impact, if any, does contributory negligence have on either periodical payments or a lump sum?

Most lawyers, both barristers and solicitors, will inevitably have had, and continue to have, exposure to the vagaries of the world of financial planning when dealing with their own affairs. Mortgages, pensions, PEPs, ISAs – our own hard-earned money is a subject close to our hearts, and we will

all no doubt have our own stories about investments that were spectacularly successful, or absolutely disastrous. They all had two things in common:

- A financial adviser in whom they have trust; and
- They entered into the transaction after a proper analysis of the risks.

Many personal injury lawyers are usually comfortable talking about financial matters as they impact on the case, in the same way that they can analyse the care regime, or occupational therapy proposal. It is part of their job, and the more experienced they are, the more familiar they become with the terminology and nuances of the report. But the important thing is that they have a report on which to base their case.

Even prior to *Thompsonstone*, it was important to commission a financial report at an earlier stage in order to introduce the concept of periodical payments to the claimant at the earliest opportunity in order to avoid the lump sum mentality and to help manage the claimant's expectations. Since *Thompsonstone*, it is imperative.

It is very easy to blur the distinction between legal and financial advice, and the inclusion of a bespoke report dealing specifically with the issues should ensure that legal advisers sleep more soundly at night. By definition, claimants themselves should also sleep safely in the knowledge that not only have their legal team obtained the maximum possible, but that it was awarded on the basis designed to provide optimum benefit after careful analysis of all the options. Quite apart from good practice, there is the self-preservation issue inherent in reducing potential professional indemnity issues.

Lawyers, and barristers in particular, should look beyond the mere transaction and nature of the individual cases. The decision to take periodical payments or a lump sum can only be made at the point of settlement, and cannot be changed thereafter. The manner in which the award is taken is just as important as the size of the award itself, and deserves the same resources and attention to detail as the other expert reports. Post *Thompsonstone*, this should be even more apparent.

◆ Stephen Maguire is a barrister at Kings Chambers, Manchester